84-715

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

STATE OF ALABAMA AND
CHARLES A. GRADDICK,
ATTORNEY GENERAL, PETITIONERS

VS.

DARRYL PRUITT, RESPONDENT

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT
(PRIOR TO FINAL JUDGMENT)

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

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STATEMENT OF ISSUES PRESENTED

1. Should this Honorable Court grant certiorari prior to final judgment in the Court of Appeals to review a decision by a United States District Court declaring an important state statute unconstitutional, where said decision is on appeal to the Court of Appeals and where:

A. This Honorable Court has granted review of a similar ruling from another circuit,

B. There is a great public interest in the case, because the state statute defines the limits of the force which is justified, to the extent that it is necessary, in making a lawful arrest, and the statute's invalidation creates great confusion, in officers and citizens alike as to what force may be justified in making a felony arrest,

C. There is a need for prompt action to clear up confusion in a fundamental aspect of the administration of criminal justice and,

D. There are no factual disputes relating to the constitutionality of the statute?

2. To what extent, if any, does the United States Constitution underwrite illegal resistance to lawful felony arrest?

3. Does the U.S. Constitution authorize a state to establish a legal defense based on established common law principles, in the interest of discouraging resistance to arrest, protecting human life and guaranteeing that the law is not impotent in dealing with lawlessness?

4. Is a state statute which creates a defense to claims and charges arising out of the use of force by police

officers, to the extent that such force is necessary to effect lawful felony arrests, repugnant to the U. S. Constitution?

THE PARTIES

In the District Court, the parties were Darryl Pruitt, Plaintiff, who is Respondent herein, and the City of Montgomery, Alabama, and Lester G. Kidd, Defendants, who are not parties herein. In the United States Court of Appeals for the Eleventh Circuit, the parties are the City of Montgomery, Alabama, and Lester G. Kidd, Appellants, Darryl Pruitt, Appellee, and the State of Alabama and Charles A. Graddick, Attorney General, interveners under 28 U.S.C. 2403, who are Petitioners herein.

The matters at issue here were raised by the Respondent in the District Court and have been at issue throughout this litigation.

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OPINIONS AND ORDERS BELOW

The order and opinion of the United States District Court for the Middle District of Alabama, declaring Section 13A-3-27, Code of Alabama, 1975, unconstitutional, are not reported. A copy of the same is submitted as Appendix "A" to this petition.

The order of the United States Court of Appeals allowing your Petitioners to intervene under 28 United States Code, Section 2403 submitted as Appendix "D" to this Petition.

JURISDICTION

This cause is now pending in the United States Court of Appeals for the Eleventh Circuit.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States District Court for the Middle District of Alabama decided this case under Ayler v. Hopper (532 F.Supp. 198 [M.D.Ala., 1981]) wherein the same District Court and Judge had ruled as dicta that Section 13A-3-27, Code of Alabama, 1975, is unconstitutional, apparently under section one of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection to the laws..."

STATUTORY PROVISIONS INVOLVED

The sole issue in this case is the constitutionality of Section 13A-3-27, Code of Alabama, 1975. The same is submitted as Appendix "B" to this Petition.

STATEMENT OF THE CASE

After the June 12, 1984, decision of the District Court declaring the statute unconstitutional, the Defendants attempted to take an interlocutory appeal. This attempt failed because the District Court took no action at all on it. Thus, this case did not get to the Court of Appeals until September 5, 1984. The record still has not been filed. Therefore, this statement cannot refer to the record.

The Petitioners have no interest in this litigation save in the constitutionality, vel non, of Section 13A-3-27, Code of Alabama, 1975. The Petitioners are neither authorized to argue nor do they argue any other issue in the Court of Appeals or here. This statement of the case is, therefore, limited to the rulings relating to the statute.

The history of this case goes back to Ayler v. Hopper (532 F.Supp. 198 [M.D.Ala., 1981]). In that case a convict sued a prison official under 42 U.S.C. 1983. The official had seen the convict escaping and, having no other means of stopping the convict, shot at him and wounded him. The plaintiff convict claimed damages for his injuries.

The defendant prison official raised the defense of good faith reliance on Section 13A-3-27, and the plaintiff asked the District Court for a ruling on the constitutionality of the statute. The Court ruled that, whether the statute was constitutional or not, the prison official had relied on it in good faith and had the right to his defense. Ayler v. Hopper, 532 F.Supp. 198, 199-200 (M.D. Ala. 1981). The Court then wrote:

> "...Presumably the plaintiff is familiar with the above and actually seeks by his first motion in limine an indication of what the Court understands to be the constitutional standards governing the plaintiff's section 1983 claim and the defendant's asserted good faith immunity defense. Because these standards have been the subject of extensive briefs by the parties, and because pretrial knowledge of the Court's

> understanding of these standards is likely to be crucial to the effective prosecution and defense of this case and in general to its orderly disposition, the Court finds it appropriate and desirable to inform the parties at this time of its understanding of these standards...." (532 F.Supp. 198, 200)

There then followed an advisory opinion declaring Section 13A-3-27 unconstitutional. The Court held that officers were barred from using deadly force to overcome resistance to any arrest. Such force, the Court opined, could only be used to prevent <u>imminent</u> death or great bodily harm. The Court wrote:

> "...It is clear to the Court that the use of deadly force by a prison official to stop an escaping felon is consitutionally tortious unless the official has good reason to believe that the use of force is necessary to prevent imminent, or at least a substantial

> likelihood of, death or great bodily harm...." (532 F.Supp. 198, 201)

Since the defendant prison official prevailed on both his right to raise the statute as a defense and in the final judgment and the plaintiff convict did not appeal, there was no occasion for appellate review of Ayler. See Ashcroft v. Mattis, 431 U.S. 171, 52 L.Ed.2d 219, 97 S.Ct. 1739 (1977).

The instant case began as a near carbon copy of Ayler. An injured arrestee sued a police officer and the City of Montgomery under 42 U.S.C. 1983. The cause came before the same court and the same judge as Ayler. It seemed that if Section 13A-3-27 is valid, then the Defendants had a valid defense. If Ayler is correct then the defendants had violated the Constitution. On June 12,

1984, the District Court re-affirmed its decision in Ayler and, rely-ing on Ayler and Garner v. Memphis Police Department (710 F.2d 240 [6th Cir., 1983], now pending in this Court) ruled Section 13A-3-27, unconstitutional and granted summary judgment for the Plaintiff. (Appendix "A")

An attempt by the Defendants to appeal the June 12, 1984, order inter-locutorily failed when the District Court took no action on the Defendants' motion. After a final judgment for the Plaintiff, the Defendants appealed to the U.S. Court of Appeals for the Eleventh Circuit. The Appeal was docketed on September 5, 1984, and your Petitioners' motion to intervene was granted on October 9, 1984. (Appendicies "C" & "D")

The Appellee in the Court of Appeals (Respondent here) has moved to stay

proceedings in the appeal pending a decision by this Honorable Court in Garner v. Memphis Police Department, above. (Appendix "E")

STATEMENT OF THE FACTS

The issue in this case is the constitutionality vel non of state statute which codifies a common law rule. The facts of the case are relevant only in suggesting the context in which the statute operated. The District Court granted summary judgment on the basis of depositions. The most significant of these are briefly digested below.

FROM THE DEPOSITION OF DARRYL W. PRUITT:

The incident took place shortly before Pruitt's twentieth birthday. (pp. 4 & 6) Prior to the incident, Pruitt had amassed a minor criminal

record for third degree theft and traffic offenses. (pp. 9-11)

At one o'clock in the morning on the date of the incident, Pruitt, two male friends and two young ladies went to a closed auto parts store on West Fairview Avenue, in Montgomery Alabama. (pp. 11-12) One of the young ladies was fifteen year old Sharon Brown. (pp. 12 & 16) Pruitt took Miss Brown into a shed behind the parts store and had sexual intercourse with her.[1] (pp. 12-15 & 18) After Pruitt dressed and while he waited for Miss Brown to dress, the two other

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1. "§13A-6-62. Rape in the second degree.

"(a) A male commits the crime of rape in the second degree if:
"(1) Being 16 years old or older, he engages in sexual intercourse with a female less than 16 and more than 12 years old; provided, however, the actor is at least two years older than the female...." (Code of Alabama, 1975)

men broke and ran from the scene. (R.p.19) Pruitt heard two commands from officer Kidd to halt, but he did not believe that the person was an officer. He continued moving away "...walking...at maximum speed....". (p. 22-23) The first shot "...sprinkled ...[his] arm and back...." (p.20) The second shot struck him in the lower back. (ibid) He was three or four yards from a ditch, but his momentum carried him into the ditch. (pp. 23-24) Pruitt described the officer who shot him as "...a black guy...." (p.22)

Th incident was investigated by the Montgomery County District Attorney's office. (p.32)

Pruitt was charged with rape in the second degree. The case was no billed by the grand jury, but Pruitt does not know why. (p.32)

FROM THE DEPOSITION OF
OFFICER LESTER G. C. KIDD:

Officer Kidd testified that he understood, based on his training, that (1) where an officer was absolutely certain that a person has committed a felony and cannot otherwise be stopped, the officer has discretion to shoot and that (2) that discretion is be exercised to protect human life. (p.11-14)

On the night of the incident, he and his partner received a radio call that there was a burglary in process at 614 West Fairview Avenue. They proceeded to the scene, and Kidd was dropped off in the wooded area behind the store. (pp. 15-16) Kidd went into the dark thicket. He received word from his partner that he, the partner, had two suspects in custody, and that the original report had come from an adjacent store and had

stated that three black males had been breaking into the parts store. (pp. 16-18) As Kidd moved on into the thicket, Pruitt jumped out from behind a bush and charged the officer. When Kidd brought his shot gun to high port in order to repel the attack, Pruitt veered off and fled toward a ditch. (p.18) What happened next takes more time to describe than it did to occur. Kidd called out, "Halt, police!" at least twice. (pp. 19-20,25,30-31,34) Officer Kidd tried to pursue Pruitt, but the conditions of the thicket prevented it. (pp. 39-40) There was not enough time nor light to determine if Pruitt had anything in his hands. (pp. 16,32,34 & 38) Kidd judged that if he did succeed in overtaking the suspect, a fight would insue, in which the officer would be disadvantaged by

his encumbering equipment, would risk losing his weapons and having them turned on himself. (p. 39-40) After calling at least twice for the running suspect to stop, Kidd fired and, when the suspect continued to run, fired again. (p. 20) In each case he aimed for the suspect's legs. (ibid)

Pellets from the second shot struck Pruitt in the buttocks. (p. 45)

Kidd later found out that the crime was rape, not burglary. (p. 46)

On the question of whether he considered Pruitt dangerous, Officer Kidd testified:

> "Q. Now, at the time that you fired the shots, did you think that Pruitt was dangerous?
>
> "A. When the subject came at me, that let me know right then that the subject would use physical force if necessary, so as far as my thinking he's

dangerous. Anytime a subject would even attempt to use physical force the subject has a potential of being dangerous because I have two weapons on me. So if I were to be knocked down and he were to take my shotgun then I'm through with.

"Q. Any other -- did you have any other reasons for believing he was dangerous at the time?

"A. None other than being a felon coming out of a building, just those two reasons, the strongest one being him coming at me..." (p. 40)

* * * *

"Q. So is it correct then that the time you shot Darryl Pruitt you didn't think he was about to kill or harm some other person?

"A. No. At the time that I shot Darryl Pruitt my thinking was that he was a fleeing felon coming from a burglary; that he also had made an attempt to physically harm a police officer but he avoided that attempt and he was a subject that I felt needed to be stopped...." (p. 84)

SUMMARY OF THE ARGUMENT

I. This Honorable Court has jurisdiction to issue certiorari to a Court of Appeals before final judgment in said Court. 28 U.S.C. 1254(1) The Court should exercise this extraordinary power in this case because: (1) The primary issue in the Court of Appeals and the only issue raised by Petitioners is the same issue in Garner v. Memphis Police Department (710 F.2d 240 [6th Cir., 1983]), now pending in this Court. Case Nos. 83-1070 and 83-1035, ___ U.S. ___, ___ L.Ed.2d ___, 104 S.Ct. 1589, 52 U.S. L.Wk 3687 (1984). Compare Taylor v. McElroy, 360 U.S. 709, 710, 3 L.Ed.2d 1528, 1529, 79 S.Ct. 1428 (1959); (2) This case is of imperative public importance, since at issue is Alabama's ability to protect its citizens and

enforce the law at the most fundamental level. Rule 18, Rules of the Supreme Court; Wilson v. Girard, 354 U.S. 524, 1 L.Ed.2d 1544, 77 S.Ct. 1409 (1957); (3) There are no issues of fact in this case. Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330, 344, 79 L.Ed.2d 1468, 1473, 55 S.Ct. 758 (1935); (4) The need for a prompt resolution of the matters at issue here is obvious, but the Court of Appeals might be well advised to grant the Respondent's motion and delay decision until this Honorable Court acts in Garner v. Memphis Police Department, above.

II. The basic issue in this case is: when is it reasonable for an officer to use firearms to effect an arrest? The common law, codified in Section 13A-3-27, Code of Alabama, 1975, draws the line at

felony-misdemeanor. The Courts which have rejected the common law rule have adopted a wide spectrum of alternative lines. The most restrictive being that adopted by the District Court in this case, which declares deadly force as always unreasonable to merely overcome resistance to arrest. (See Appendix "A")

IT IS THE FATE OF THE COMMON LAW RULE THAT IT ALWAYS COMES BEFORE THE COURTS IN WORST CASE SENARIOS. Thus, this rule which seeks to balance rights and protection between officers and arrestees is always tested in cases wherein natural sympathy tends to rest with a resisting arrestee. The attempts to charactarize the common law rule as placing resisting arrestees beyond the protection of the law and as inflicting punishment are false. The rule creates a defense and, if it authorizes anything,

it does so in the same sence that the defense of entrapment authorizes the crimes which it excuses. Like all defenses, that created by the common law rule is based on sound policy considerations. In the case of the common law rule, these include: (1) The protection of human life and limb of officers and citizens, including arrestees, by discouraging resistance, extending to officers a full measure of self defense, providing officers who must use force in making arrests with clear and practical guidance in confusing, life threatening, emergency situations, and permitting officers, who must deal on an emergency basis with volatile and unpredictable life threatening situations, with sufficient discretion, and (2) Preventing the law from underwriting the lawlessness of resistance to arrest.

A. This Honorable Court has never addressed the constitutionality of the common law rule nor the Alabama statute, and ought to do so in this case.

B. While the courts which have condemned the common law rule have proposed a wide variety of alternatives, all agree that the actions of police officers are to be judged by hindsight. This Honorable Court has condemned the use of hindsight in after-the-fact review of the decisions of warrant magistrates (Illinois v. Gates, ___ U.S. ___, 76 L.Ed.2d 527, 546-547, 103 S.Ct. ___ [1983]; Massachusetts v. Upton, ___ U.S. ___, 80 L.Ed.2d 721, 727, 104 S.Ct. ___ [1984]) and defense attorneys (Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674, 694-695, 104 S.Ct. ___ [1984]). If hindsight is inappropriate in reviewing the actions of those who need not act in

emergency situations, how is it appropriate in judging the actions of those who must do so?

C. Athough two U.S. Circuits have condemned the common law rule, two Circuits and three state supreme courts have recently upheld the constitutionality of the rule.

ARGUMENT

I.

REASONS FOR GRANTING THE WRIT PRIOR JUDGEMENT IN COURT OF APPEALS

Although this Honorable Court clearly has jurisdiction to issue certiorari to a Court of Appeals "...before...rendition of judgment or decree...." (28 U.S.C. 1254[1]), this is an extraordinary departure from normal procedure and will be permitted only in extraordinary circumstances. This

Honorable Court has by rule and decision identified these circumstances. The instant case meets all of these criteria.

The primary issue in the Court of Appeals and the only issue which the Petitioner State and its Attorney General are authorized to argue there, is the constitutionality of Section 13A-3-27, Code of Alabama, 1975. In Garner v. Memphis Police Department (710 F.2d 240 [6th Cir., 1983]) the Sixth Circuit found a Tennessee statute similar to Section 13A-3-27, above, unconstitutional. In invalidating Section 13A-3-27 in the instant case, the District Court cited and relied on Garner. Appendix "A", page 8. As the District Court noted, this Honorable Court is now reviewing Garner on both appeal and certiorari. Tennessee v. Garner, No. 83-1035, and Memphis Police Department v.

Garner, No. 83-1070, ___ U.S. ___, ___ L.Ed.2d ___, 104 S.Ct. 1589, 52 U.S. L.Wk. 3687 (1984). The pendency of a case involving an identical issue is grounds for granting the writ prior to judgment in the Court of Appeals. Taylor v. McElroy, 360 U.S. 709, 710, 3 L.Ed.2d 1528, 1529, 79 S.Ct. 1428 (1959). However, here the pending case not only involves the same issue but provided a basis for the judgment in the instant case. For this reason, the writ should issue now.

The need for a rule of law governing the use of force in overcoming resistance to lawful arrest is obvious. For centuries this office has been served by a common law rule. See 6A C.J.S. Arrest, Section 49(b); 5 AM. Jur. 2d, Arrest, Section 84; 83 A.L.R. 3d 157-230. Section 13A-3-27, Code of

Alabama, 1975, is a codification of this common law rule. In striking down this statute, the District Court rejected an ancient and successful rule of law. The District Court's action leaves Alabama officers with no practical rule to guide them in the use of force. Because of the District Court's ruling the State of Alabama's ability to protect the public, especially in high crime areas, is severely limited. This untenable situation will remain until a practical rule is established by this Honorable Court. For these reasons this case is of imperative public importance. Rule 18, Rules of the Supreme Court; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584, 96 L.Ed. 1153, 1166, 72 S.Ct. 863,

26 A.L.R. 2d 1378 (1952); Norman v. B & O R.R. Co., 294 U.S. 240, 79 L.Ed. 885, 55 S.Ct. 407, 95 A.L.R. 1352 (1935); Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330, 344, 79 L.Ed. 1468, 1473, 55 S.Ct. 758 (1935). This is especially so since the matter at issue here affects at the most basic practical level the ability of the State of Alabama to administer the criminal laws. Compare Wilson v. Girard, 354 U.S. 524, 1 L.Ed.2d 1544, 77 S.Ct. 1409 (1957) and United States v. Nixon, 418 U.S. 683, 686-687, 41 L.Ed.2d 1039, 1051-1052, 94 S.Ct. 3090 (1974).

Since the District Court declared the statute unconstitutional on its face by summary judgment, there are no issues of fact in this case. See Railroad Retirement Board v. Alton R.R. Co., 295

U.S. 330, 344, 79 L.Ed. 1468, 1473, 55 S.Ct. 758 (1935).

The need for a prompt decision either upholding the statute or providing Alabama officers with another practical rule to guide them in the use of force in making arrests is obvious. Yet, the Court of Appeals, given the importance of the validity of the statute to the District Court's decision, would no doubt be well advised to grant the Respondent's motion (Appendix E) and stay proceedings in this case until this Honorable Court acts in Tennessee v. Garner, above.

There are, as already outlined, many valid reasons for this Honorable Court to consider the constitutionality of Section 13A-3-27, Code of Alabama, 1975, now, perhaps in conjunction with Garner, and there are no reasons for waiting.

Therefore, the writ ought to be granted now.

II.

REASONS FOR GRANTING THE WRIT GENERALLY

INTRODUCTION: Section 13A-3-27, WHAT IT IS, WHAT IT IS NOT AND CRITICISMS OF IT.

Section 13A-3-27, Code of Alabama, 1975, is the Alabama codification of the common law rule limiting the use of force in overcoming resistance to lawful arrest. See 6A C.J.S., Arrest, Section 49(b); 5 Am. Jur. 2d, Arrest, Section 84 and 83 A.L.R. 3rd 157-230. The common law rule may be succinctly stated:

An officer is justified in using whatever force is (1) necessary in overcoming resistance to a lawful arrest, provided (2) such force is reasonable.

There is absolutely no controversy over this rule. The controversy swirls

around the definition of "reasonable." The common law rule, in an effort to establish a standard which is sufficiently certain to be of practical use in highly uncertain situations, defines "reasonable" in terms of the legal definition of the involved crime: Any force short of deadly force is "reasonable" in the case of a misdemeanor arrest; any force, including deadly force, is "reasonable" in the case of a felony arrest. The various critics of the common law rule have proposed almost as many alternative definitions for "reasonable" as there are proponents. The spectrum of these definitions ranges from the suggestion that deadly force may not be reasonable to overcome resistance to arrests for tax evasion, antitrust

violation, etc.[2]. (Judge McCree concurring in Beech v. Melancon, 465 F.2d 425, 426-427 [6th Cir., 1972], cert. denied 409 U.S. 1114, 34 L.Ed.2d 696, 93 S.Ct. 927) to the position taken by the District Court in the instant case. That position is: Deadly force is never "reasonable" in overcoming resistance to arrest; such force is permissible only for the purpose of guarding against immanent threats to life of limb. (Appendix "A")

Another definition, although one about which there is no controversy, is that of "deadly force." "Deadly force"

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2. Such arrests are seldom made under the emergency situations which are the rule's usual field of operation. Since the officers can usually choose the time, place and manner of such arrests, they can minimize resistance and, ipso facto, minimize the force necessary to overcome resistance.

is identified almost entirely, if not entirely, with the discharge of firearms. High speed automobile chases, blows to the head and other activities which can and sometimes do cause death, are not generally considered "deadly force", unless a death actually results. Thus, in the instant case even though the officer did not intend to kill, did not shoot to kill and did not kill, the District Court rejected the suggestion that he did not use deadly force, since he discharged a firearm. However, the striking of a resisting traffic law offender in the head with a flashlight is not considered use of deadly force, even where the resulting injuries are far more serious than those caused by the firearm in the instant case. See Wellington v. Daniels, 717 F.2d 932 (4th Cir., 1983).

It is the fate of the common law rule and the statutes based on it that they never come before the courts, except in "worst case senarios." And, it is on the basis of these worst case senarios that the rule is always attacked. Everyday in Alabama and throughout the Nation thousands of felony arrests are made with no more force than the spoken word. The submission of these felony arrestees is always effected, at least in part, by the knowledge that resistance would be futile, since the officer would be justified in using whatever force is necessary in overcoming resistance. Yet, the cases that come before the courts arise invariably out of those unusual arrests where force is necessitated. In fact, the cases most commonly before the courts are those rarest of arrests where the use of deadly force was compelled.

No one would condemn a surgical procedure which is 99.9% successful on the basis of the occasional failures, without even a glance at the benefits of the numerous successful operations. Yet, this is the basis on which the common law rule is condemned. This is an important point. The common law rule seeks to balance rights and protection between the officer and the arrestee. The concern of those who condemn the common law rule centers almost entirely on the protection of the arrestee. One is reminded of Dr. Derek C. Bok's controversial observations of a year ago:

> "...[C]haracteristic of adjudication is the tendency to concentrate on the immediate case at hand while paying less heed to the effects on a wider public...." ("A Flawed System" by Derek C. Bok, Harvard Magazine, May-June, 1983, p. 38 at 42.)

The common law rule is often characterized as placing resisting arrestees beyond the protection of the law. Such a characterization ignores at least two thirds of the rule, which balances rights and protection between officers and arrestees. First, the arrest must be lawful. Second and of the greatest practical importance, absolutely no force is justified beyond that which is necessary to overcome resistance. See, for example, Clark v. Ziedonis, 513 F.2d 79, 83 (7th Cir., 1975). This limitation has two important effects: It limits the use of force by the officer to that which is necessary, and it places in the arrestee the practical power to decide how much force will be necessary and, therefore, justified.

The common law rule is often characterized as providing punishment for resisting arrest. This is false. Police officers who undertake to punish arrestees violate the Constitution, the criminal law and the civil law of both the State and the Nation. In arresting even an escaped death row inmate who has been convicted of mass murder, an officer is justified in using not one scintilla more force than is necessary. The fallacy of the characterization of this ancient rule as relating to punishment is demonstrated by the fact that the rule distinguishes only between felonies and misdemeanors and does not otherwise relate to punishment. Punishment is the business of judges not police officers.

The common law rule is often characterized as "authorizing" the use of

deadly force in stopping fleeing felons. This is a most unusual use of the word "authorize." The common law rule, as it is embodied in the invalidated Alabama statute, is a defense.[3] Does the defense of insanity authorize murder or rape by insane persons? Does entrapment authorize drug trafficking or prostitution by entrapped defendants? Does contributory negligence authorize negligence injury? Defenses represent policy decisions to hold defendants justified or excused for actions normally condemned. The basis of the defenses above mentioned and that codified in Section 13A-3-27, Code of Alabama, 1975,

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3. The defense compares closely with assumption of risk: One who undertakes to resist a lawful arrest assumes the risk of any injuries occasioned by the force necessary to overcome the resistance.

is sound policy considerations. There are at least two general sound policy considerations justifying the defense established by Section 13A-3-27: The protection of human life and the upholding of the law as a potent force against lawlessness.

1.

PROTECTION OF HUMAN LIFE

The common law rule protects human life by (1) discouraging resistance of arrest, (2) permitting officers a full measure of self protection in the event of resistance, and (3) giving officers sufficient discretion to deal with confusing and unpredictable life threatening situtaions.

Any resistance to arrest situation is highly dangerous to innocent bystanders, arrestees and officers. The initial

function of any rule governing force incident to arrest is not to define the officer's civil liability nor even guide the officer in overcoming resistance but to discourage resistance. Non-resistance to arrest is the safest course for society, innocent bystanders, officers and arrestees. For centuries the common law rule has discouraged resistance to the great mass of lawful arrests.

Where an arrestee, notwithstanding the rule, chooses to resist arrest, the inherent danger to the officer is universally recognized. Even Courts which have rejected the common law rule have recognized that officers may resort to deadly force to protect themselves from death or serious injury. However, these courts disregard the fact that an officer effecting an arrest is ipso facto

deprived of the two best protections anyone has: (1) avoiding potentially violent altercations and (2) leaving the scene when a violent altercation occurs. In fact, freedom from fault in bringing on the difficulty and retreat are elements of common self defense. 40 Am. Jur.2d Homocide, Section 140. An officer undertaking a lawful arrest is always "at fault" in bringing on the difficulty, and, if the arrest is resisted, the officer expected to go forward, not retreat. When an altercation between private citizens comes to a final termination, the law forbids one of the citizens to seek out the other and renew the combat. 40 C.J.S., Homocide, Section 133. However, when a resisting arrestee makes good his escape, an officer is under a duty to seek him out and effect

the arrest. The Courts which condemn the common law rule assume that a felon who is running away from an officer is no danger to the officer. Yet, the law of self defense has always recognized strategic withdrawal, as opposed to completely breaking off the combat. 40 C.J.S., Homocide, Section 132. This is especially relevant in the case of an arresting officer, who is expected to pursue. The Courts which reject the common law rule assume that an officer confronted with an unarmed resisting arrestee can safely engage in a phsical struggle. Gamble v. State (48 Ala. App. 605, 266 So.2d 817 [1972]) and Taylor v. State (48 Ala. App. 443, 265 So.2d 886 [1972]) are cases which arose out of just such struggles. In both cases the struggles cost the officers their guns, and in one (Gamble), the struggle with an

unarmed teenage drunk driver cost an officer his life. Although the courts which reject the common law rule seem to think that they are authorizing officers to fully protect themselves, these Courts are in fact leaving police officers with bearly half a loaf of the protection permitted private citizens. Our society sends its police officers into dangerous situations to defend our basic human rights and our way of life; we owe them more than a remnant of common self defense. The common law rule balances concern for the arrestee with concern for the officer.

The state has an interest in establishing a practical rule for guiding officers in the use of force in making arrests. The facts of the instant case present a prime example of the usual

situation where a rule governing the use of force in making an arrest comes into play: In a dark thicket a subject first charges the officer then flees. The officer can see only the subject's shirt and socks. (Kidd's deposition, p. 34) The officer has little information or time to analyze what he knows and no time at all to gather additional information. The officers have been dispatched to investigate a burglary but discover a rape. Any rule governing the use force in arrest must allow officers to proceed on what they know, not what they don't know. The rule must be clear and clearly understood. It must be drawn in terms which require a minimum of interpretation. The resisted arrest situation cannot be controlled by guessing games. Normally, there is not enough time to

make social judgments nor to apply philosophical principles. The risk that the arrestee, the officer and a later reviewing court will reach different conclusions about how much force is or was justified must be minimized if not eliminated. For centuries the common law rule has served this office well.

The strength of the common law rule is demonstrated by the very cases wherein it is condemned. The Eighth Circuit condemned the common law rule, but refused to establish anything in its place. Mathis v. Schnarr, 547 F.2d 1007, 1020 (8th Cir., 1976); vacated 431 U.S. 171, 52 L.Ed.2d 219, 97 S.Ct. 1739. The Sixth Circuit would allow an officer to use deadly force against a resisting arrestee who "...poses...a danger to the community if left at large...." (Garner v. Memphis Police Department, 710 F.2d

240, 246 [6th Cir., 1983], pend. on cert. and app.), but the District Court in the instant case would allow the use of such force only "...to prevent imminent, or at least a substantial likelihood of, death or great bodily harm...." Ayler v. Hopper, 532 F.Supp. 198, 201 (M.D.Ala., 1981); Appendix "A".[4] All of these rules require officers to act only on solid information in situations where information is scarce. All of the rules advanced in place of the common law rule are cast in terms which call on officers and arrestees to make judgments which

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4. The difference between these rules is of great practical importance. If the fleeing convicts in Ayler had been death row inmates, the rule of that case still would not have allowed the guard to fire, but the Sixth Circuit rule probably would allow him to do so. Of course, as a practical matter the guard probably would have no way of knowing exactly what the escapees' criminal history was.

they cannot make and to make them at the risk of their lives and civil and criminal liability. In rejecting the common law rule, the District Court and the other lower courts have discarded a rule which has worked well for centuries. In its place they propose rules which are utterly irrelevant to the actual resisted arrest situation. If the common law rule is rejected, it will take years to establish a suitable substitute. During those years, how many arrestees, officers and innocent people will suffer injury or death because someone made the wrong guess.

From what has already been said, it is, obvious that any rule governing the use of force in making arrests must provide arresting officers with enough discretion to deal with highly volatile and unpredictable life-threatening

situations. An officer who undertakes to make a lawful arrest is in the paradoxical position of confronting a citizen in an effort to take away his freedom, while at the same time minimizing the danger to innocent bystanders, the officer himself and the arrestee. There is no way that the law can anticipate all of the conditions of lighting, weather, and terrain under which such confrontations will take place. Arrestees, like all humans, are unpredictable, but arrestees, especially those who resist arrest, are highly likely to be under the influence of alcohol or other drugs or in a state of rage or panic, rendering them all the more unpredictable. An officer attempting to deal with such situations obviously must have broad discretion.

2.

UPHOLDING THE LAW AS A POTENT FORCE AGAINST LAWLESSNESS

Resisting a lawful arrest is an unlawful act, and it creates a lawless situation. The question in this case is: Can the law deal with it? The common law rule says: "Yes." The rule adopted by the District Court in this case says: "No, if deadly force is necessary." The various other rules proposed in the place of the common law rule say: "Sometimes."

The courts which have struck down the common law rule on constitutional grounds hold by necessary implication that the U.S. Constitution extends its protection to certain forms of lawlessness. The constitution cannot underwrite lawlessness.

The rules of these cases will necessarily encourage flight and other forms of resistance to arrest. Arrestees who obey the law and surrender will be punished for their crimes, while those who successfully resist arrest will have as a practical matter an absolute defense. The State has an interest in preventing such absurd results. We all have a vital interest in the potency of the law.

SUMMATION

The real issue in this case is: Does the U.S. Constitution permit the states to maintain a rule of law governing the use of force in overcoming resistance to lawful arrest which (1) discourages rather than encourages resistance to arrest, (2) extends the

fullest possible measure of protection to innocent citizens, officers and arrestees, rather than just to arrestees and (3) underwrites lawfulness rather than lawlessness?

The controversy over the common law rule is primarily a matter of practicality versus philosophy. The common law rule has worked well in practice for centuries. The critics of the common law rule apparently seek in the place of the anicent practical rule a rule that is philosophically pure, whether it works or not.

A.

NOVEL QUESTION

This Honorable Court has never ruled on the constitutionality of the common law rule nor on the validity of the Alabama statute. The need for relief from the present confusion is obvious. This Court should issue the writ and address these matters now.

B.

CONFLICT WITH THE PRIOR DECISIONS OF THIS HONORABLE COURT ON HINDSIGHT JUDGMENTS

As already observed, the courts which have condemned the common law rule have advanced various conflicting rules in its place. However, one thing all of these court agree about is that the officer's actions are to be judged, not on the basis of what the officer knew or judged at the time of the event but on

the basis of what is known to and judged by the court on after-the-fact review.

The instant case falls into this pattern. There was no dispute as to the fact that, based on a citizen's report, officers were dispatched to investigate a burglary. However, the crime turned out to be rape not burglary. The District Court held officer Kidd liable on the basis of the finding: "...There was no burlgary as suspected...." (Appendix "A", p. 3) At the time of the arrest, Officer Kidd could see only the Respondent's shirt and socks (Kidd's deposition, p. 34), but the officer was held liable for shooting at an unarmed man.

While this Honorable Court has never addressed the common law rule governing the use of force in making an arrest, the Court has condemned hindsight judgments

of warrant magistrates and defense attorneys. Search warrants are not to be subjected to de novo review. Illinois v. Gates, ___ U.S. ___, 76 L.Ed.2d 527, 546-547, 103 S.Ct. ___ (1983); Massachusetts v. Upton, ___ U.S. ___, 80 L.Ed.2d 721, 727, 104 S.Ct. ___ (1984). In Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984]) this court rejected hindsight judgments of the acts and omissions of defense attorneys. The Court wrote in pertinent part:

> "...It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable...
>
> "...[A] court deciding an actual ineffectiveness claim must judge the reasonableness

> of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct...." (80 L.Ed.2d 674, 694-695; emphasis supplied)

The rules of these cases are as reasonable as hindsight judgments are unreasonable. But, warrant magistrates and defense attorneys do not act in the dark nor on unfamiliar terrain as police officers commonly do. A judge, who is unsure how to act, can take the matter under advisement; a lawyer whose case takes an unexpected turn can request and will usually receive a recess or continuance. An officer confronting a resisting arrestee must judge and act in a flash. Magistrates and lawyers do not act at the risk of life and limb, police officers do. If it is wrong, as this Court has held, to judge warrant magistrates and attorneys on the basis of hindsight, what fairness is there in

so judging police officers?

C.

CONFLICT WITH U.S. CIRCUITS AND STATE SUPREME COURTS

The common law rule was once unquestioned as the established law. Although it is questioned nowadays, two federal circuits and three state supreme courts have reaffirmed the constitutionality of the common law rule within the last decade or so. Connors v. McNulty, 697 F.2d 18 (1st Cir., 1983); Jones v. Marshall, 528 F.2d 132 (2nd Cir., 1975); Hilton v. State, 348 A.2d 242 (S.J. Ct. Maine, 1975); Schumann v. McGinn, 307 Minn 446, 240 N..2d 525, 531 (1976); Schumann v. St. Paul, ___ Minn. ___, 268 N.W.2d 903 (1978); Reese v. Seattle, 81 Wash.2d 374, 503 P.2d 64, 83 A.L.R.3rd 157 (1972), cert. den. 414 U.S. 832, 38 L.Ed.2d 67, 94 S.Ct. 169.

CONCLUSION

In conclusion, the Petitioners respectfully submit that the decision and opinion of the District Court in this case erroneously decides a novel question and conflicts with the prior decisions of this Honorable Court on the use of hindsight in judging official actions and with the decisions of numerous circuit and state supreme courts upholding the constitutionality of the common law rule. For these reasons, as well as the urgency and simplicity of the issue, the Petitioner prays that this Honorable Court will issue the writ of certiorari now and review the decision and opinion of the Honorable United States Distr ct Court for the Middle District of Alabama and on such review will reverse the

decision of said Court to the extent that the same holds that Section 13A-3-27, Code of Alabama, 1975, repugnant to the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Charles A. Graddick, Attorney General and the State of Alabama, Petitioners, do hereby certify that on this ___ day of November, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for all of the other parties in the Court of Appeals, by mailing the same to them first-class postage prepaid and addressed as follows:

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